the ground beneath a viaduct could never in any reasonable sense have fronted or adjoined the roadway of the viaduct.

But it was decided in the House of Lords in the case mentioned (*first*) that the line and embankments of a railway below the level of a street were not lands "bounding or abutting on such street;" (*secondly*) that it made no difference that there was a passage communicating between the railway line and the street; (*thirdly*) that although the parapets of the bridge were built and supported entirely upon the railway company's ground, and were the property of the railway company, the parapets could not be regarded as land "bounding or abutting" on the street in the sense of the Act, because they did not admit of being used or let for profit.

That decision turned upon the construction of different statutes from those with which we are dealing, viz., The Metropolis Management Acts of 1855 and 1862. But I cannot say that the provisions of the Greenock Police Acts in regard to this matter are materially different from the statutes which fell to be construed in that case. Instead of the words "owners of land bounding or abutting on such street," we have here "the proprietors of all lands and heritages in such street, or fronting or adjoining both sides of the line of such street."

Again, while in The Metropolis Management Act of 1855 "owner" is defined (sec. 250) to mean "the person for the time being receiving the rack-rent, or who would receive the same if let at a rack-rent," "proprietor" is defined in the Greenock Police Act 1877, sec. 3, to mean proprietors of lands and heritages, and to apply to fiars, liferenters, heritable creditors, &c., "or other persons who shall be in the actual enjoyment, or who shall take the rents or profits or produce of such lands and heritages."

Again, here, as in the case of *The Great Eastern Railway Company*, there is on the level of the street at the point in question no property of the Railway Company presently adjoining the street except the parapets of the bridge, the line and station buildings being at least 20 feet below, although there is a communication by means of steps with the street.

It will thus be seen that both as regards the terms of the statute and the condition of the ground there is a very close resemblance between the two cases. But there are features which, not without hesitation, I think sufficiently distinguish this case. (*First*) Inverkip Street is not a new street, as was the case in the *The Great Eastern Railway Company* v. *Hackney*. The Railway Company acquired property and houses fronting and having access to the street, the former proprietors of which undoubtedly would have been liable in this expense under the existing Act, which had similar provisions, and I am disposed to think that the Railway Company could not at their own hand free themselves from that liability and, as it were, withdraw so much of the frontage to the street from contribution according to the use which they chose to make of their property. It is to be observed that the decision of the House of Lords (which reversed the decision of the Court of Appeal) was concurred in with some difficulty by one of the three noble and learned Lords who decided it, Lord Blackburn saying (p. 698)—"I have had more difficulty than seems to have been felt by either of the two other noble and learned Lords who heard the argument." And Lord Watson, who gave the leading opinion, says on p. 696—"Whether land situated below the level of a street is or is not to be deemed as abutting on it within the meaning of the statutes appears to me to be a question of degree depending on the circumstances of the case."

The question then being one of degree, I find it sufficient for my judgment that the land when acquired by the railway company fronted and adjoined an existing street in the sense of the Greenock Police Acts, and that they altered the level of it to suit the purposes of their own undertaking.

But (*secondly*) there is this not unimportant feature, that there are not merely a line of rails but station buildings and platforms at that spot, no doubt below the level of the street but connected by a stair with the street and the booking-office which undoubtedly fronts and adjoins the street.

On the whole matter I am for affirming the judgment of the Dean of Guild.

LORD YOUNG was absent.

The Court dismissed the appeal and affirmed the interlocutor appealed against.

Counsel for the Petitioner and Respondent—Salvesen, K.C.—M'Lennan. Agents—Miller & Murray, S.S.C.

Counsel for the Respondents and Appellants—Guthrie, K.C.—King. Agents—Hope, Todd, & Kirk, W.S.

Tuesday, March 15.

SECOND DIVISION.

[Lord Low, Ordinary.

CALEDONIAN RAILWAY COMPANY *v.* MUIRHEAD'S TRAWLERS LIMITED.

Railway—Carriage of Goods—Perishable Merchandise — "Passenger Train" — Railway Rates and Charges (Caledonian Railway) Order Confirmation 1892 (55 *and* 56 *Vict. c. lvii.*)

In a question between a railway company and consignors of fish under consignment notes "for merchandise to be carried by passenger train at owner's risk," *held* that a fish train having all the equipment and all the privileges of a passenger train was a "passenger train."

By contract dated 16th February 1893 between Muirhead's Trawlers, Limited, fish

salesmen, and the Caledonian Railway Company, arrangements were made for the carriage of fish from Granton to Glasgow by passenger train at certain reduced rates and at owner's risk. The terms of the contract, which were embodied in a printed form supplied by the Railway Company, sufficiently appear from the following extract from the form of the consignment-note which was in use:—"*Consignment-Note for Merchandise to be carried by* PASSENGER TRAIN *at Owner's Risk.*" "*To* the Caledonian Railway Company, Granton Station.—17*th Sept.* 1901.—Receive and forward the under-mentioned merchandise, to be carried at the special or reduced rate below the company's ordinary rate, in consideration whereof I agree to relieve the Caledonian Railway Company, and all other companies or persons over whose lines the merchandise may pass, or in whose possession the same may be, from all liability for loss, damage, mis-delivery, delay, or detention, except upon proof that such loss, damage, misdelivery, delay, or detention arose from wilful misconduct on the part of the company's servants. And I also agree to the conditions on the back of this note. This agreement shall be deemed to be separately made with all companies or persons parties to any through rate under which the merchandise is carried. Signature of Sender or his Representative, *Pro* MUIRHEAD, P. THOMSON."

In the present action the Caledonian Railway Company sued Muirhead's Trawlers, Limited, for £61, 4s., being the balance of their account for the carriage of fish. The defenders did not dispute the account, but averred in defence a counter-claim for loss incurred by the failure of the pursuers to carry their fish in time for market. Besides averments as to fault on the part of the Railway Company on certain specified occasions (which it is not necessary to detail for the purpose of this report) they averred generally that "the pursuers did not carry or arrange for the carriage of the fish in dispute by passenger train as stipulated for in the said contracts."

The defenders pleaded, *inter alia*—"(3) The defenders having sustained loss, injury, and damage through the fault of the pursuers, are entitled to set off the amount thereof against the sum sued for, and in respect thereof to have absolvitor. (4) The special contracts founded upon by the pursuers are not binding upon the defenders, in respect that (c) The stipulated mode of carriage by passenger train was not adopted by the pursuers."

Proof was allowed and led.

The import of the proof, so far as relating to the question whether the fish were carried by passenger train, is summarised in the opinion of the Lord Ordinary, *infra*.

On 14th November 1903 the Lord Ordinary (LOW) pronounced an interlocutor whereby he decerned against the defenders in terms of the conclusions of the summons.

Opinion.—[*After stating the nature of the action and the contentions of the parties*]—"The facts are these—The pursuers run no passenger trains from Granton, and the fish in question was carried by a special fish-train which left Granton at an hour in the morning which enabled it to reach Glasgow in time for the fish-market there. The fish-train was composed of waggons adapted to be run with a passenger train, the engine was a passenger engine, with passenger driver and stoker, and a passenger break-van with a passenger guard was attached. Upon one of the two occasions which are now in question the fish-train appears to have been attached to a passenger train at Slateford, and upon the other occasion, although it was not attached to a passenger train, it was given the same facilities as if it had been a passenger train.

"The question is, whether in these circumstances the fish-train can be regarded as a 'passenger train' in the sense in which that expression is used in the consignment-notes? A great deal of light is thrown on that question by the provisions of the Act of Parliament which was passed in 1892 (55 and 56 Vict. cap. lvii.) to confirm a Provisional Order made by the Board of Trade fixing the classification of merchandise traffic and the maximum rates to be adopted by the pursuers. The schedule of maximum rates consists of six parts, and Part V. is described as 'containing the rates and charges authorised in respect of perishable merchandise by passenger train, with the provisions and regulations which are to apply to such class of merchandise.' Turning to Part V., I find that the general heading is 'Perishable Merchandise by Passenger Train,' and under that heading there is, in the first place, the 'provisions and regulations applicable to the conveyance of perishable merchandise by passenger train;' in the second place, a specification of perishable merchandise under three divisions; and, in the third place, the maximum rates and charges for these three divisions.

"Now, the first of the provisions and regulations is, that 'The Company shall afford reasonable facilities for the expeditious conveyance of the articles enumerated in the three divisions set out hereunder either by passenger train or by other similar service.' In like manner, the third regulation provides that 'The company shall not be under obligation to convey by passenger train, or other similar service, any merchandise other than perishable.' The regulations therefore apply not only to passenger trains in the strict sense of the expression, but to 'other similar service,' and I think that it is plain that the maximum rates authorised have a similar application. It therefore seems to me that the expression 'passenger train,' when used in reference to the conveyance of perishable goods, must be construed as including 'other similar service.' Indeed, I think that the statutory regulations which I have quoted amount to an interpretation of the words 'passenger train' when used in reference to the conveyance of perishable merchandise as including

'other similar services,' and accordingly I think that the words when used in the consignment-notes in question must be read as having that meaning. If that is a sound view, there can, I think, be no doubt that the fish train falls to be regarded as a service similar to a passenger train.

"I may add that even if the matter was not so clear as I think it is, the objection could hardly be sustained when taken by the defenders, seeing that they accepted the consignment-notes as embodying the contract under which the fish was to be carried, in the knowledge that it was to be sent, and with the intention that it should be sent, by the fish train." [*The Lord Ordinary then dealt with the averments of fault on specified occasions, on which he held that the defenders had failed to prove their case.*]

The defender reclaimed, and argued—A "passenger train" was a train designed to carry passengers, advertised to stop at and start from particular stations at particular times—*Burnett* v. *Great North of Scotland Railway Company* (1885), 10 App. Cas. 147. The Lord Ordinary's construction of the Act of 1892 did not apply to the consignment-notes here in question, which made no reference to "other similar service." It was not denied that the defenders' fish had been late for market, and this admission imposed on the pursuers an onus, which they had not discharged, to explain the delay—*Scottish Marine Insurance Company* v. *Turner*, March 3, 1853, 1 Macq. 334, Lord Truro, p. 340; Dickson on Evidence, sec. 276. Further, the pursuers being in breach of contract could not rely on the terms of their contract with the defenders, and as common carriers were liable for loss of market—*M'Connachie* v. *Great North of Scotland Railway Company*, November 6, 1875, 3 R. 79, 13 S.L.R. 39; *Anderson* v. *North British Railway Company*, February 18, 1875, 2 R. 443, 12 S.L.R. 312.

Argued for the respondents—The pursuers had fulfilled their obligations in all respects. The defenders' definition of "passenger train" could not be supported. The pursuers had no powers to run trains for passengers between the termini in question — Railway Rates and Charges (Caledonian Railway) Order Confirmation 1892 (55 and 56 Vict. cap. 57).

LORD TRAYNER—My opinion in this case is that the Lord Ordinary is right both in fact and in law. The terms of the contract between the parties I take it to be those expressed in the consignment-note, which provides that the goods are to be carried by "passenger train at owner's risk." The Lord Ordinary says that "passenger train" does not necessarily mean a train that carries passengers, and this the reclaimers concede, because, while the Railway Company may provide a train which is fitted for passenger traffic and which may convey passengers if they turn up—it cannot find them if they do not come—and therefore a train may be a "passenger train" though there are no passengers in it. I think a reasonable construction of the words "passenger train" is this—a train which has all the equipment of a passenger train and all the privileges of a passenger train. If that is the meaning of the contract, as I think it is, the question comes to be whether or not on the two occasions libelled the pursuers failed to carry it out. On that question, which depends on the proof, I agree, as I have said, with the Lord Ordinary.

LORD MONCREIFF—I am of the same opinion. I am quite satisfied that the train by which the fish were sent was a "passenger train" in the sense of the contract, and that being so, the Railway Company cannot be held liable unless the defenders prove that the loss or detention arose from wilful misconduct on the part of the Railway Company's servants. [*His Lordship then dealt with the specific occasions of fault above referred to.*]

On the whole matter I have no hesitation in thinking that the judgment should be affirmed.

The LORD JUSTICE-CLERK concurred.

LORD YOUNG was absent.

The Court adhered.

Counsel for the Pursuers and Respondents—Guthrie, K.C.—Blackburn. Agents—Hope, Todd, & Kirk, W.S.

Counsel for the Defenders and Reclaimers — Salvesen, K.C. — Wilton. Agent — W. Marshall Henderson, S.S.C.

Thursday, March 17.

FIRST DIVISION.

[Sheriff of Aberdeen.

DONALD *v.* IRVINE.

Process—Appeal—Competency—Failure to Box Prints—Motion to Repone—"Cause Shown"—A.S., 10th March 1870, *sec.* 3 (1) *and* (3).

In an appeal the appellant failed to print and box the papers until two days after the expiry of the period prescribed by A.S., 10th March 1870, sec. 3 (1). He moved under sec. 3 (3) to be reponed, and explained that the failure to print and box timeously had been caused by the miscalculation of a clerk, arising out of his use of a diary which omitted Sundays. The Court *granted* the motion, and *reponed* the appellant.

By section 106 of the Court of Session Act 1868 (31 and 32 Vict. c. 100) power is given to the Court to pass Acts of Sederunt for, *inter alia*, altering the course of proceeding prescribed in the Act. The Act of Sederunt, 10th March 1870, made in pursuance of this power, in section 3 (1) enacts: "The appellant shall, during session, within